circumstances, help to develop a sense of shared purposes and commitments among local citizens, and ultimately facilitate 'novel social and economic experiments.'"[17] "[A]gainst the backdrop of a highly complex set of social problems that defy decision purely at local or purely at federal levels"[18] such as those created by the Missouri River dams, it is critical to preserve the federalist framework of the Clean Water Act that gives states a meaningful role. That is the underlying issue in this case. This court should not decline to consider this issue merely because other states are not facing a similar environmental problem caused by the Corps that threatens the designated beneficial use of the most important water body in their state. (ND Pet. 7-16)

3. ***PUD No. 1.*** *PUD No. 1* involved narrative water quality standards nearly identical to those involved here: Washington designated the beneficial use of the stream as a "Class AA water" capable of supporting "'[s]almonid . . . migration, rearing, spawning, and harvesting.'"[19] Here, the designated use for Lake Sakakawea is a "Class 1" water "capable of supporting growth of Salmonid fishes and associated aquatic biota."[20] In *PUD No. 1*, this Court held that such narrative criteria are enforceable by states and that the dam in that case had to be operated consistently with this designated use.[21] The federal respondents attempt to distinguish this case from *PUD No. 1* as discussed in our petition (ND Pet. 29-30) on the grounds that

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[17] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 57 (Knopf 2005) (quoting *Gonzales v. Raich*, 125 S.Ct. 2195, 2220 (2005)).

[18] *Id.* at 57.

[19] 511 U.S. 700, 714 (1994).

[20] N.D. Admin. Code § 33-16-02.1-09(1)(f). (ND App. 108-109, 119)

[21] 511 U.S. at 713-20. *See also* ND App. 43-44.

this isn't a CWA § 401 case. (Fed. Op. Br. 10) This should be rejected for the reasons discussed by the *amici* states in support of the petition. (SD et al. Amici Br. 11-12 and 17-18) When Congress amended CWA § 313 (§ 1323) in 1977, it coupled that strengthened waiver of federal immunity with repeal of the exemption of federal agencies from § 401 certification requirements for dams that had previously existed for federal agencies under § 401(a)(6),[22] and added the requirement that dams regulated under § 401 must comply with § "303"[23] – the § 303 water quality standards that states must establish for all navigable waters within their boundaries. (§ 1313(c) ND App. 91-92) N.D. Admin. Code chapter 33-16-02.1 consists of the water quality standards that North Dakota established under § 303 for its navigable waters, including Lake Sakakawea, that it seeks to enforce against the Corps.

Respectfully submitted,

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[22] ND App. 121, quoting Sec. 61(b) of Pub. L. No. 95-217, 95th Cong., 1st Sess., and SD et al. Amici App. at 12, showing language of § 401(a)(6) repealed by Sec. 61(b).

[23] ND App. 122, quoting Sec. 64 of Pub. L. No. 95-217, 95th Cong., 1st Sess.

No. 05-628

In The
Supreme Court of the United States

STATE OF NORTH DAKOTA, THROUGH THE NORTH DAKOTA DEPARTMENT OF HEALTH, AN AGENCY OF THE STATE OF NORTH DAKOTA; JOHN HOEVEN, GOVERNOR; WAYNE STENEHJEM, NORTH DAKOTA ATTORNEY GENERAL, EX REL. STATE OF NORTH DAKOTA; NORTH DAKOTA DEPARTMENT OF HEALTH,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, A FEDERAL AGENCY; GREGG F. MARTIN, DIVISION COMMANDER, NW DIVISION, PORTLAND, OREGON, UNITED STATES ARMY CORPS OF ENGINEERS; JEFFREY BEDEY, COLONEL, DISTRICT ENGINEER, OMAHA DISTRICT, STATE OF NEBRASKA, STATE OF MISSOURI, STATE OF SOUTH DAKOTA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* NEBRASKA PUBLIC POWER DISTRICT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The Nebraska Public Power District ("NPPD") is a political subdivision of the State of Nebraska organized and existing under the laws Nebraska.[1] NPPD owns and operates Cooper Nuclear Station ("CNS"), the largest single unit power generating station in Nebraska. The CNS facility is located downstream of Nebraska City, Nebraska on the banks of the Missouri River. The facility depends on Missouri River water for cooling purposes and to insure compliance with thermal discharge limitations imposed under a National Pollutant Discharge Elimination System ("NPDES") permit associated with the facility.[2] NPPD purchases electricity from the Western Area Power Administration ("WAPA"), an agency of the federal government that markets electricity generated at the six hydroelectric power plants on the main stem of the Missouri River. NPPD is one of WAPA's largest customers, consistently among the top ten purchasers of firm energy and traditionally the largest purchaser of firm energy from the Pick-Sloan Project. The United States Army Corps of Engineers' ("Corps") operation of the main stem reservoirs on the Missouri River directly affects NPPD's operation of CNS and the supply of low-cost hydropower available for NPPD's acquisition and provision to its customers.

In the proceedings below, North Dakota sought to limit releases by the Corps from Gavins Point Dam to

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[1] *See* NEB. REV. STAT. § 70-602 (Reissue 2002). As such, NPPD is not required to obtain consent for the filing of this *amicus* brief pursuant to Rule 37.4.

[2] A NPDES permit issued under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, authorizes discharges of pollutants, including thermal discharges, into the waters of the United States. 33 U.S.C. § 1342.

approximately 21,000 cubic feet per second ("cfs") and use the conserved water to preserve cold water habitat in Lake Sakakawea. The Nebraska Power Association ("NPA") has analyzed the potential impacts to Nebraska power supplies from a sustained reduction in summer flows to 21,000 cfs. NEBRASKA POWER ASSOCIATION, IMPACTS OF POSSIBLE CHANGES IN MISSOURI RIVER FLOWS ON NEBRASKA'S ELECTRIC ENERGY INDUSTRY (Dec. 2003) ("NPA Report"). The NPA Report estimated direct impacts to CNS from such low summer flows to be $7,000,000 annually. *Id.* at 13. The NPA Report also discusses the impact of reduced flows on the availability of low cost hydropower generated by the Corps and marketed by WAPA to NPPD and other utilities, concluding Nebraskans could see an increase in energy costs of $6,600,000 annually. *Id.* at 15. The NPA Report estimated the impact of long-term (i.e., full summer) reduced flows on the entire region at nearly $1 billion. *Id.* at 22. The NPA's conclusion that low summer flows compromise both water supply and hydropower benefits is supported by the Corps' analysis in the Final Environmental Impact Statement for Missouri River Master Water Control Manual (2004) ("FEIS"). *E.g.*, FEIS §§ 5.9, 5.10.

SUMMARY OF ARGUMENT

NPPD files this brief to: 1) Provide the Court with a broader view of the economies supported by the Corps' Missouri River reservoir operations, and 2) explain how the relief sought by North Dakota in this case would negatively impact those economies. North Dakota incorrectly presents this case as pitting upstream recreation against downstream navigation. Much more is at stake

here. Significant infrastructure has built up around and is dependant upon the minimum flows required to support navigation. The benefits of ongoing Missouri River operations exceed $1 billion annually. Many of these benefits are supported by the Corps' maintenance of the minimum navigation flows North Dakota would curtail if allowed to enforce its state water quality standards under the circumstances presented to the courts below.

ARGUMENT

I. NORTH DAKOTA'S DEPICTION OF ECONOMIES IN THE MISSOURI RIVER BASIN IS INCOMPLETE.

Contrary to North Dakota's portrayal, the Missouri River reservoir system provides multiple benefits to states throughout the Missouri River Basin. These benefits would be negatively impacted by enforcement of North Dakota's water quality standards. Many of these benefits, not discussed in North Dakota's petition, depend on navigation flows for consistent and reliable quantities of water. While navigation may not be the most economically prosperous use in the Basin,[3] navigation flows support other downstream uses resulting in myriad benefits to the

[3] The Eighth Circuit Court of Appeals properly recognized that the relative economic benefit provided by navigation to the Basin is irrelevant. *See In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 629-30 (8th Cir. 2005) ("Nothing in the text or legislative history of the [Flood Control Act] suggests that Congress intended the priority of interests under the [Flood Control Act] to shift according to their relative economic value. Arguments based on the wisdom of the priorities established . . . must be addressed to Congress.").

Basin States. Thus, this case is not merely about upstream recreation versus downstream navigation.

For example, the National Academy of Science ("NAS") concluded the benefits of ongoing Missouri River operations exceed $1 billion annually. *See generally* NATIONAL ACADEMY PRESS, THE MISSOURI RIVER ECOSYSTEM: EXPLORING THE PROSPECTS FOR RECOVERY (2002) ("NAS Report"), ch. 4. The primary benefits are from hydropower, municipal water supplies, and flood damage reduction, "each of which has annual benefits measured in hundreds of millions of dollars." NAS Report at 89. The water supply benefits from Missouri River operations "accrue at intakes for thermal power plants and at municipal, irrigation, commercial/industrial, domestic, and public water intakes so long as daily flows exceed minimum elevation requirements for water intakes." *Id.* at 90. The MISSOURI RIVER MASTER WATER CONTROL MANUAL (2004) ("Master Manual") explains that more than 1,600 intakes and intake facilities have been identified on the main stem of the Missouri River. Master Manual VII-46, § 7-11.2. According to the Corps:

> These intakes are primarily for municipal, industrial, and individual water supplies, fossil and nuclear-fueled powerplant cooling, and irrigation withdrawals directly from the Missouri River. . . . The lower river reach is very reliant on the river for water supply because 94 percent of the population served . . . is located downstream of the [dam and reservoir] System. In addition, 75 percent of the generation by thermal powerplants using the Missouri River, . . . is located below the System.

North Dako[illegible]ttempts to trivialize the countervailing interests at stake by focusing solely on the navigation industry and disregarding entirely the other benefits supported by the Corps' navigation-based operations. However, when viewed more broadly, the value of the downstream benefits dwarfs that of upstream recreation. North Dakota's explanation of its recreational interest itself is misleading. North Dakota implies the value of recreation in North Dakota is $84.7 million annually. Petition at 15. However, not all of these benefits are derived from upstream reservoir use, let alone solely from Lake Sakakawea. In fact, all the reservoirs in North Dakota only account for 26%, or $22 million, of the recreation benefits on the system. NAS Report at 95.

The downstream benefits of Corps operations are supported in large part by the Corps' maintenance of minimum navigation flows. The Corps has determined, based on over 100 years of hydrologic data and 60 years of operations, that, *at a minimum*, releases of 25,000 cfs are required from Gavins Point Dam to support navigation. Master Manual (2004) at VII-10. To ensure adequate water remained in Lake Sakakawea in 2003, North Dakota sought to limit releases by the Corps from Gavins Point Dam to approximately 21,000 cfs and use the conserved water to preserve cold water habitat in the lake. *See* Appellant's Appendix (filed before the Court of Appeals) at 782 (Affidavit of Todd S. Sando, North Dakota Assistant State Engineer ¶ 43) (noting releases from Gavins Point must be reduced to 21,000 cfs to establish "a minimum volume of cold water fish habitat" in Lake Sakakawea). North Dakota acknowledged that navigation could not be supported under such conditions. *See id.* at

782-83 (Affidavit of Todd S. Sando ¶¶ 43-45). As the Corps' Chief of Missouri River Basin Water Management explained: "Failure to meet minimum service flow targets would end commercial navigation on at least a portion of the river." *Id.* at 1507 (Declaration of Lawrence J. Cieslik ¶ 16). The Corps also explained that other project purposes would be negatively impacted by flow reductions below minimum navigation service levels. *Id.* at 1509-11 (Declaration of Lawrence J. Cieslik ¶¶ 22-29).

NPPD is particularly concerned about the potential impact enforcement of North Dakota's water quality standards would have on hydropower generation and the ability of powerplants downstream of Gavins Point Dam to operate at capacity.

II. THE AVAILABILITY OF HYDROPOWER WOULD BE ADVERSELY IMPACTED BY THE RELIEF SOUGHT BY NORTH DAKOTA.

The Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944) ("FCA"), requires the Corps to produce hydropower from the main stem dams to provide affordable electric power over a multi-state region and to offset the enormous cost of dam construction. Section 5 of the FCA states:

> Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to *encourage the most widespread use thereof at the lowest possible rates*

> *to consumers* consistent with sound business principles. . . .

(Emphasis supplied). *See also* S. DOC. NO. 247, 78th Cong., 2d Sess. (1944) at 1, 3-4; S. DOC. NO. 191, 78th Cong., 2d Sess. (1944) at 12 ("The low-cost power to be developed should be given the widest possible distribution for the benefit of the whole region.") The Corps' Master Manual explains that "[h]ydropower is the only Congressionally authorized purpose of the System that actually returns money to the Federal Treasury." Master Manual VII-48, § 7-12. "Realization of the maximum power potential provided by the water passing through the dams of the System requires that hydropower operations be carefully integrated into regulation of the overall System. . . . Regulation of the System projects is scheduled to develop the maximum power benefits to the extent reasonably possible." *Id.*

The six main stem dams support 36 hydropower units with a combined capacity of 2,435 megawatts ("MW"). Hydropower generated at these dams provides "dependable capacity to meet annual peak power demands" thereby firming reliability in the Mid-continent Area Power Pool ("MAPP"). FEIS 3-119.[4] Hydropower has favorable operating characteristics such as efficient peaking, rapid rate of unit unloading and rapid power availability in the event of emergencies. *Id.* Hydropower also reduces the overall cost of electricity. *Id.*

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[4] The hydropower system on the Missouri River provides about 9% of the energy used in the MAPP region, which includes all of Iowa, Minnesota, Nebraska, and North Dakota, most of South Dakota, and portions of Illinois, Montana, and Wisconsin. *See* FEIS at 3-119.

Power generated from hydroelectric facilities on the Missouri River is marketed primarily to public power and rural cooperative utilities in the MAPP region. For example, in 2002, WAPA supplied approximately 1.8 million MW of firm power and energy to Nebraska entities alone (approximately 7% of the total energy sold in Nebraska for the year), resulting in $32.8 million in federal revenue. *See* NPA Report at 15. On a broader scale, hydropower benefits produced on the Missouri River total more than $615 million annually. NAS Report at 97. Of that benefit, Nebraska receives 27.3%, or approximately $168 million. *Id.*

Simply put, hydropower is generated by the flow of water out of the upstream dams through turbines, which generates electricity. To the extent water is retained upstream in Lake Sakakawea, it is not being released to generate hydroelectricity or revenue.

III. THERMAL POWER GENERATION WOULD BE ADVERSELY IMPACTED BY THE RELIEF SOUGHT BY NORTH DAKOTA.

Twenty-five electric generating stations, including coal-fired and nuclear-fired plants, are located on the main stem of the Missouri River, from which they draw cooling water for their steam-electric generating processes. These plants have a gross electric generating capacity of 15,084 MW. Seventy-four percent of this capacity is produced by powerplants in the river reaches below Gavins Point Dam. The nuclear powerplants have a combined generating capacity of 2,556 MW. FEIS 3-113-114.

The Corps explains how low Missouri River flows adversely affect facilities reliant on Missouri River water:

"[F]low in the river and ambient water temperature affect a plant's ability to operate within [NPDES] standards." FEIS 3-114. However, "[e]ven when standards can be met, variable costs may be incurred when mainstem lake or river levels fall below the elevation required for normal intake operation. These costs include operation and maintenance (O&M), pumping, personnel, and emergency operations costs." *Id.* The FEIS explains "[l]oss of capacity could force utilities to construct additional facilities or purchase outside energy to replace the decreased capability. In some cases, cooling towers are not viable, and replacement generating capacity would need to be constructed if thermal discharge requirements would significantly curtail power generating capability." FEIS 3-114.

If thermal discharge limitations significantly curtail power generating capability at CNS, it is highly probable that all similarly situated plants on the Missouri River system would experience the same or similar circumstances. Losing this much power generation would have severe impacts on the stability and efficiency of the MAPP region as the electricity system would not be able to handle demand requirements. Although utilities might be able purchase enough power to make up for the loss, the Missouri River Basin lacks sufficient transmission capacity to import enough replacement power into the region. Power outages and voltage and power swings could result, potentially leading to lost transmission lines, and cascading outages. NPA Report at 21-22.